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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-220

LOCAL 223, UTILITY WORKERS UNION OF AMERICA
Petitioner

vs.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
THE DETROIT EDISON COMPANY AND
WILLIE STAMPS, ET AL
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Local 223, Utility Workers Union of America, hereafter referred to as "Local 223", Petitions for a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

1. The Opinion of the Court of Appeals appears at (App. A, *infra* p. 1-24). 2. The modified opinion appears at (App. B, *infra* p. 1-3). The Opinion and Judgment of the District Court appears at 365 Fed Supp 87 and appears in (App. C, *infra* p. I 253-I 326).

JURISDICTION

The Judgment of the Court of Appeals was entered initially on March 11, 1975 and modified after Petitions for Re-Hearing by the Plaintiffs on May 16, 1975. The jurisdiction of this Court is invoked under U.S.C.A. 1254 (1).

QUESTIONS PRESENTED

(1) Whether or not the record in this case supports the finding of the District Court and affirmed by the Sixth Circuit Court of Appeals that the seniority system in effect between Local 223 and the Detroit Edison Company is not a bona fide seniority system, when the seniority system has always treated all workers equally without regard to race or color; and whether or not the District Court's Order, as affirmed by the Court of Appeals, which results in reverse discrimination as to the white members of Local 223, can be sustained under the Equal Employment Opportunity Act.

(2) Whether the District Court and the Court of Appeals were correct in holding that the Unions in this case

who admittedly had nothing to do with the hiring, rejecting or transferring of any employees were guilty of a violation of Title VII or of THE NATIONAL LABOR RELATIONS ACT because the Unions did not pressure the employer for a change of its hiring practices.

(3) Whether the Courts were correct in directing a Quota System for the promoting and transferring of employees to certain jobs and by so doing prohibit the transfer and promotion of seniority employees as required by the Collective Bargaining Agreement.

(4) Whether or not Local 223 should respond in attorney fees to the Plaintiffs when the record in this case contains no proof of any discriminatory act by the Union as to the Plaintiffs in this cause.

STATEMENT

This is a case of alleged employment discrimination against the Detroit Edison Company, Local 223, Utility Workers Union of America and Local 17, International Brotherhood of Electrical Workers, the Unions who represent some of the employees of Edison, as certified bargaining representatives.

This case involves an important question as to the right of a court to alter the seniority system in effect between the parties when such system makes no distinction between workers as to race, color or any other reason and such agreement provides that there shall be no discrimination because of race by the employer as to any provision of the collective bargaining agreement. The Trial Courts' finding of fact as affirmed by the Court of Appeals is clearly erroneous and not supported by the record. The

courts held that certain provisions of the collective bargaining agreement operated to perpetuate the effects of past discrimination, when such provisions apply equally to white employees. The seniority system in every provision is not only racially neutral on its face, it is racially neutral in its application.

The Court of Appeals of the Third, Fifth and Seventh Circuits have spoken on the seniority question contrary to this decision and others decided by the Sixth Circuit wherein fictional or super seniority has been ordered. The Supreme Court has granted certiorari in the *Franks* case (No. 74-728.) from the Fifth Circuit. There is also pending a petition for writ of certiorari in the *Meadows* v *Ford Motor Company* case from the Sixth Circuit. 510 Fed 2d 1084 (1975).

Another important question in this case relates to the establishment of a quota system, by the District Court, affirmed by the Appellate Court, wherein seniority employees are barred from bidding on job vacancies because of the quotas which permits and orders the Company to hire from the outside rather than train or promote from within as required by the Collective Bargaining Agreement.

This case involves also an important question as to the duty of a Union under Title VII where concededly the Union does not hire, reject, test nor promote any worker, black or white, and as to a Union's duty of fair representation of black workers when no black worker ever used the grievance procedure to protest alleged discrimination because of race.

The District Court made findings of fact and held that the Unions and the Edison Company were liable to the Plaintiffs in punitive damages and ordered changes in the seniority system as it relates to the black members of Local

223. The District Court provided for forward and backward pay to the individual Plaintiffs in this cause.

The Edison Company and the Unions each filed appeals of the District Court Judgment to the Sixth Circuit Court of Appeals. The Court of Appeals made significant changes in the decision of the District Court and remanded the case to the District Court for the purpose of modification of the judgment as it related to many issues in the case.

The Court of Appeals, however, failed to address itself to the appeal of Local 223 that there was no basis on which to find Local 223 guilty of any kind of discrimination against its black members because the record does not factually support any such finding, and the district court's decision was clearly erroneous.

Nor did the Court of Appeals address itself to the issue that the seniority system entered into between Local 223 and the Detroit Edison Company was a bona fide system and that the holding by the District Court that the seniority system was a violation of Title VII of the Act was clearly erroneous and not supported by the record. The District Court decision, as affirmed by the Sixth Circuit Court of Appeals, directs super seniority to certain black members of Defendant Local 223 and results in reverse discrimination as to the white members of Local 223.

The Court of Appeals also directed the District Court to apportion the attorney fees among the several defendants and since Local 223 was guilty of no discriminatory act, such direction as to Local 223 is improper and ought to be overturned.

I.

WHETHER OR NOT THE RECORD IN THIS CASE SUPPORTS THE FINDING OF THE DISTRICT COURT AND AFFIRMED BY THE SIXTH CIRCUIT COURT OF APPEALS THAT THE SENIORITY SYSTEM IN EFFECT BETWEEN LOCAL 223 AND THE DETROIT EDISON COMPANY IS NOT A BONA FIDE SENIORITY SYSTEM WHEN THE SENIORITY SYSTEM HAS ALWAYS TREATED ALL WORKERS EQUALLY WITHOUT REGARD TO RACE OR COLOR AND WHETHER OR NOT THE DISTRICT COURTS' ORDER AS AFFIRMED BY THE COURT OF APPEALS WHICH RESULTS IN REVERSE DISCRIMINATION AS TO THE WHITE MEMBERS OF LOCAL 223 CAN BE SUSTAINED UNDER THE EQUAL EMPLOYMENT OPPORTUNITY ACT.

We say at the outset, that the Court of Appeals properly overturned a substantial portion of the Judgment of the District Court in this cause. We do not quarrel with any of the changes in the District Court's Order made by the Court of Appeals. We do, however, object to the finding by the Court of Appeals where it indicated that:

> "The District Court found that the system of departmental seniority which prevailed at Edisons resulted in further discrimination against its black employees. The record supports this finding. In order to transfer to a high opportunity line of progression in a different department, an employee is required to forfeit all accumulated seniority and often must take a pay cut. Given the small number of blacks hired in the past and the practice of assigning newly hired blacks to menial jobs, this seniority system has served to lock black employees into low opportunity areas of work." (App. A, p. 16).

These findings which have been affirmed by the Court of Appeals clearly are erroneous. The record, contrary to the Court's opinion, does not support that conclusion.

In the instant case, the proofs developed that the seniority system had been in effect for over thirty years. The system provided equal treatment for workers without regard to race, color or any other reason.

The record shows that in no department were there as many blacks as whites and that blacks and whites worked in the same job classifications. The employees of every department transferred on the same basis. Not only do black workers forfeit accumulated seniority if they transferred to another department, such is the situation of the white workers also. While it is true that both black and white workers would, if they transferred from a given job in one department to a job in another department which had a lower pay scale at the beginning rate, suffer a pay cut if he made such transfer, this situation applied to both blacks and whites alike. There is economic justification for such a situation because of the training required for a worker who would transfer from one department to another which could and would result in the opportunity to progress to a much higher wage classification in the future.

There is no justification for the conclusion that these sections of the seniority provisions as found in the collective bargaining agreement have any relationship to discrimination because of race.

Since Title VII provides that a bona fide seniority system shall not be interfered with by a Court, the Court erred in its conclusion that the seniority system, although neutral in its face, had the effect of perpetuating past discrimination and erred also that to correct such alleged

discrimination that blacks were entitled to super seniority.

This is not the case, as has been true of many Title VII cases, where the Courts have found that the seniority systems were discriminatory because they provided for black seniority as opposed to white seniority or established different criteria for a black worker to transfer as related to a white worker. None of the Title VII cases in which violations have been found are applicable to the instant situation.

Title VII clearly mandates that a bona fide seniority system should not be disturbed. We fail to understand how a Court can disturb a system that is not only neutral on its face, but is also neutral in its application. Since all workers are treated in an equal manner, how can the system operate to perpetuate past discrimination?

The seniority issue has been decided in several circuits contrary to the Sixth Circuit's expression favoring the change of seniority systems to provide super seniority for all blacks whether or not they have suffered from any discrimination.

In *Jersey Central Power and Light* v *International Brotherhood of Electrical Workers,* 508 F2d 687, Third Circuit 1975, the Court held that Congress did not intend to change seniority systems under the guise that they might perpetuate past discrimination. The Court held that the challenge to a bona fide seniority system required proof of an intent to discriminate or to discriminate in fact.

In *Waters* v *Wisconsin Steel Works,* 502 F 2d 1309, Seventh Circuit 1974, the Court held that the seniority system which was challenged as having the effect of perpetuating the effects of past discrimination was a bona fide

system and that the legislative history of the Act supported its decision.

In *Watkins* v *United Steel Workers,* the most recent of the seniority decisions, the Court of Appeals for the Fifth Circuit reversed the District Court which found a seniority system which applied equally to blacks and whites was a violation of Title VII because it perpetuated the employer's past discriminatory practices. The Court of Appeals held that historical past discrimination was not a valid argument to upset a seniority system when none of the blacks could prove discrimination as to himself. (10 F.E.P. Cases 1297.)

The decision in the instant case results in a situation where two workers hired on the same day with the same background as to experience and education, one black and one white, receive separate treatment if and when they transfer to other departments.

If they both transfer to a department, other than that in which they were hired, to a beginning job classification which requires training on the job to secure the necessary ability to perform the job, the white worker receives a reduction in wages to the rate of the classification, the black worker carries his wage rate to the new job classification. The white worker does not carry his company seniority to the new department, the black worker carries his company seniority. The only reason for the preferential treatment is because one worker is black. There is no requirement that the black worker prove that he was discriminated against. He need only prove he is black.

The Court has by this decision established a whole group of discriminatees. The white employees of Edison who are affected by this reverse discrimination, who themselves are

innocent of any discriminatory act, are nevertheless to be discriminated against so long as they continue their employment at Edison.

The Equal Opportunity Act does not provide for preferential treatment. It provides for equal treatment.

This decision has created a rift between the white and black members of Local 223 which did not exist prior to this decision. The record of the case reflects that Edison hired an increasing number of blacks prior to this litigation. The hiring was conducted without any incident on the part of the Union or its members.

The reverse discrimination feature of the decision cannot be logically explained to the white members of the Union.

Local 223 is committed to a policy of equal opportunity in the work place but vehemently objects to the decision which creates discrimination, rather than rectifies alleged past discrimination.

II.

WHETHER THE DISTRICT COURT AND THE COURT OF APPEALS WERE CORRECT IN HOLDING THAT THE UNIONS IN THIS CASE WHO ADMITTEDLY HAD NOTHING TO DO WITH THE HIRING, REJECTING OR TRANSFERRING OF ANY EMPLOYEES, WERE GUILTY OF A VIOLATION OF TITLE VII OR OF THE NATIONAL LABOR RELATIONS ACT BECAUSE THE UNIONS DID NOT PRESSURE THE EMPLOYER FOR A CHANGE OF ITS HIRING AND TRANSFER PRACTICES.

The Court of Appeals found on page 17 of its Opinion (App. A.)

> "The two local unions argue that they did not do the hiring, rejecting, testing or promoting and

> should not be held responsible for any of Edison's acts of discrimination. It has long been settled that the Union must attempt to protect its minority members from discriminatory acts of any employer." *Steele* v *L & N RR,* 323 US 192, 199, (1944).

The Court of Appeals is clearly wrong in the citation of the *Steele* case as having any application to the fact in this case. The *Steele* case did not involve the issue of hiring, rejecting, testing or promoting.

In the *Steele* case the Union failed to represent its black members and in fact had bargained with the employer to eliminate blacks. There are not such proofs here. Nowhere in this record was there any evidence that Local 223 failed to act upon any grievance initiated by any of its black members for any reason whatever and certainly there is no evidence that it failed to act with regard to any grievance based upon race discrimination.

The Court of Appeals went on to say on Page 17 of its opinion (App A, p. 17) that the obligation to protect minority members from discriminatory acts of any employer requires:

> "the Union to assert the rights of its minority members in collective bargaining sessions, and not passively accept practices which discriminate against them." Quoting *Macklin* v *Spector Freights Systems,* 478 F2d at 989.

The facts in the *Macklin* case were that the Union failed to process a grievance to arbitration but agreed with Spector Freight Systems that Macklin could only acquire seniority if Spector established a D. C. terminal. The bar-

gaining agreement required the dovetailing of seniority or to establish a separate seniority of employees who were employees of a corporation known as Jacobs prior to the purchase of Jacobs' business and operating rights by Spector Freight Systems, Inc. The complaint was that the Union and Spector conspired to defeat the employment rights of Macklin because of race. The District Court dismissed the complaint. The Court of Appeals reversed and remanded to see if Plaintiff could support his allegations. There is no evidence in the instant case that Local 223 refused to process any grievance by a black member or that it engaged in any conspiracy to thwart the rights of its black members.

The Court of Appeals' quote from the *Macklin* is dicta. There the Union failed to act responsibly, when asked to act by *Macklin*. There is no evidence in this record that the Union was asked to respond or to process a grievance of any black and that it failed to process such complaint in a non-discriminatory manner.

The duty of fair representation has its basis in the National Labor Relations Act. The Act, however, does not give a Union the right to determine the composition of the work force.

This Court in an early decision held:

> "The Act does not interfere with the normal exercise of the right of the employer to select its employees or to discharge them", *Labor Board* v *Jones & Laughlin,* 301 U.S. 1, pp. 45, 46.

Clearly then, the Court of Appeals decision imposing a duty on the Unions to police the employer's hiring practices has no legal basis. A Union represents only those individuals whom the employer chooses to hire and there is

no legal basis by which a Union can determine the composition of the work force.

Local 223 agrees that it has an obligation to represent its black members as well as it white members and to provide for equal treatment of them all. We submit that this record proves that Local 223 has carried out its obligation without question.

We are not certain from reading the Court of Appeals' Opinion whether or not Local 223 is being held guilty of a violation of Title VII or of its duty of fair representation as to its black members or just what the trial court meant we were guilty of since discrimination as to hiring sounds in Title VII and the Court inappropriately cited a National Labor Board duty of a Union to fairly represent employees.

The undisputed facts developed during the trial were, that the individual black members who testified, have been, at one time or another and some at the time of the trial, officials of Local 223. Each of such individuals was charged with the responsibility of the writing and processing of grievances. Not one of the Plaintiffs' witnesses ever filed a grievance alleging he was discriminated against because of race, neither did any other black member. Some of the black witnesses had been on the Union Bargaining Committee and the record shows that they never proposed any contract language which related to hiring, transfer or any other kind of discrimination based upon race.

The Supreme Court has held that before an allegation of the breach of a duty of fair representation can lie against a Local Union that the Complainant must show that he sought to exercise the grievance machinery provided for under the Collective Bargaining Agreement or that he was frustrated in such attempt because of unfair discriminatory treatment by his Union. There were no such proofs here. *Vaca* v *Sipes,* 386 U.S. 171.

III.

WHETHER THE COURTS WERE CORRECT IN DIRECTING A QUOTA SYSTEM FOR THE PROMOTING AND TRANSFERRING OF EMPLOYEES TO CERTAIN JOBS AND BY SO DOING PROHIBIT THE TRANSFER AND PROMOTION OF SENIORITY EMPLOYEES AS REQUIRED BY THE COLLECTIVE BARGAINING AGREEMENT.

The Collective Bargaining Agreement provides for the filling of job vacancies by posting such jobs so that present employees can transfer to them. If no employee bids the Company then fills the job by hiring from the outside.

The Company has historically hired employees to the lowest job levels and has transferred such employees by a bidding system to job vacancies as they occur. The Company has by an on the job training system, and in some cases by classroom training, given its work force the opportunity to learn new skills to fill job vacancies.

The District Court in its order, Section 11, (App C p. I 321), provides as follows:

> "Subject to the availability of applicants the Company shall be recruiting and hiring black applicants or by the promoting and transferring of black employees, fill all future vacancies which are filled from outside the Company or inside the Company in the jobs listed below on the basis of three blacks for every two whites until 25% of the employees in each of these jobs and lines of progression are black."

The Company has implemented this provision and there have been numerous instances wherein jobs have been posted and the black employees of the Company have failed to bid. Because of the quota system the Company has refused to permit white seniority employees to successfully bid to available jobs. The Company has been hiring outside the work force to fill such jobs.

The quota system operates to deprive white seniority employees of the opportunity to bid to available open jobs and is creating a situation wherein a white employee with years of service is precluded from job advancement because he is white. Title VII does not command this result. It in fact prohibits such discrimination.

The quota system should be stricken from the decision of this case as being an unconstitutional invasion of the right of each employee to equal treatment. If the presently employed blacks do not wish to transfer to job vacancies as they occur, the white employees should be permitted to transfer if they desire. The Company may then hire from the outside to fill jobs on the lowest levels as they have historically done and preserve the right of advancement to the presently employed work force, both black and white.

IV.

WHETHER THE COURT OF APPEALS PROPERLY DIRECTED LOCAL 223 TO PAY ATTORNEY FEES.

The Court of Appeals in its remand directed the District Court to apportion attorney fees among the three Defendants in this cause. Since Local 223 has conducted itself in an exemplary manner as to the very serious obligation it has to all of its members, an award of attorney fees against it is unjustifiable.

CONCLUSION

For all of the foregoing reasons, we request the grant of the writ.

Respectfully submitted,

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Dated: August 8, 1975.